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IN THE

Supreme Court of the United States

October Term, 1962.

No. **1012**

FRANK E. LIPP and BETTY FRIEDMAN, Executrix of the Estate of JOSEPH FRIEDMAN, Deceased,
Petitioners,

v.

THE UNITED STATES.

Petition for a Writ of Certiorari to the United States Court of Claims

April 11, 1963.

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THE REPORTER COMPANY, INC., Walton, N. Y.—UN 5-4131—1963

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IN THE

Supreme Court of the United States

October Term, 1962

No.

FRANK E. LIPP, and BETTY FRIEDMAN, Executrix of the Estate of Joseph Friedman, Deceased,

Petitioners,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Frank E. Lipp and Betty Friedman, pray that a writ of certiorari issue to review the judgments of the United States Court of Claims, Washington, D. C., in the above-entitled actions.

Opinions Below

The opinions of the Court below (Appendices A and B, *infra*, A 1, A 51) are reported, respectively, *Lipp v. United States*, at 301 F. 2d 684 (1962), and *Friedman v. United States*, at 310 F. 2d 381 (1962).

Jurisdiction

The opinion of the court below dismissing the petition in *Lipp v. United States*, *supra*, was entered April 4, 1962 (A 1); the order of the court overruling plaintiff's motion for rehearing was entered on November 7, 1962 (A 50); and the order of the court overruling plaintiff's motion for reconsideration was entered on January 11, 1963 (A 50). In *Friedman v. United States*, *supra*, the opinion of the court below dismissing the petition was entered on November 7, 1962 (A 51), and the order of the court overruling plaintiff's motion for rehearing was entered on January 11, 1963 (Appendix B, *infra*, A 92). Under the practice of the United States Court of Claims, there is no formal judgment additional to an opinion dismissing a petition. The jurisdiction of this Court to review decisions of the Court of Claims is invoked under 28 U. S. C. §1255(1). The review of these cases on certiorari to the United States Court of Claims is sought in a single petition pursuant to Rule 23(5), Revised Rules of the Supreme Court of the United States, 28 U. S. C. following §2680.

Question Presented

Whether an action in the United States Court of Claims begun well within the six years following an allegedly arbitrary, capricious and unlawful denial of a claim timely made to a Board for the Correction of Military Records,

established in a service department pursuant to an Act of Congress, 10 U. S. C. §1552 (A 95), and over which claim the said Correction Board has exercised jurisdiction, is barred by limitations, 28 U. S. C. §2501 (A 95), simply because more than six years have elapsed between the initial occurrence of the events with which the claim is concerned and the commencement of the suit in the Court of Claims.

Statutes Involved

The statutes involved, 5 U. S. C. 1009, 10 U. S. C. §1552 and 28 U. S. C. §2501, are set forth in Appendix C, *infra* (A 94).

Statement of the Case

Both petitioner Lipp and Joseph Friedman, deceased husband of petitioner Betty Friedman, were non-Regular medical officers of the Army of the United States who served on extended active duty with the Army during World War II. Both were in good health when they entered upon such duty. Both incurred disabling physical defects while serving, and incident to their extended active service. Both were relieved from active duty, not for physical disability, and neither of them has received any retirement pay or benefits as provided by law for service members who become incapacitated for active duty in line of duty, and incident to their active duty.

Joseph Friedman, prior to his relief from active duty, met a number of medical boards and retiring boards, all of which found him unfit for general service and one of which recommended his retirement. The last retiring board, however, found him "not permanently incapacitated for active duty at [that] time" and recommended his re-

examination and revaluation after six months (A 51). For reasons which cannot now be established, this was not done (A 52).

In Lipp's case, the petitioner suffered from multiple sclerosis, an incurable disease of the nervous system which is characterized by periods of exacerbation and remission. He exhibited symptoms while on active duty which, in retrospect, were attributable to multiple sclerosis but at the time were not correctly diagnosed. His trouble was not definitely identified until some two years after his relief from duty (A 15, 25). When his infirmity was discovered, he requested, but was refused, permission to appear before an Army Retiring Board to determine his entitlement to retired pay (A 18).

Applications were made on behalf of both men, Lipp by himself, and Joseph Friedman by his widow and executrix, Betty Friedman, to the Army Board for Correction of Military Records asking for correction of their respective records to reflect their retirement for physical disability and consequent entitlement to retirement pay and benefits. The Board denied both applications. Each petitioner thereupon filed suit in the United States Court of Claims claiming the retirement pay which they had been denied, alleging that such denial, on the part of the Correction Board, was arbitrary, capricious and unlawful. Each suit was filed within six years after the alleged arbitrary and capricious action on the part of the Correction Board, pursuant to the statute limiting actions in the Court of Claims to those filed within six years after the claim has accrued. 28 U. S. C. §2501. The court below, however, held that both were time-barred, petitioner Friedman's having accrued in 1946 or 1947 (A 88), and petitioner Lipp's upon the refusal of the Department of the Army to grant him an appearance before a Retiring Board in 1950 (A 5). Both petitions in the court below were there-

fore dismissed on the ground that the alleged arbitrary, capricious and unlawful actions on the part of the Army Board for Correction of Military Records did not give rise to a cause of action cognizable by the Court of Claims and that any cause of action petitioners might have was barred by limitations (A 5, 53).

Reasons for Granting the Writ

1. The decisions of the court below, holding the petitioners' claims to be barred by limitations, are not only in direct conflict with a doctrine long established by this Court, but with a multitude of its own holdings. A generation ago, this Court clearly stated the principle that, in the absence of compelling language to the contrary in the statute which creates a right, the Court may and will review the acts of the officer administering the statute, when such acts are arbitrary, capricious, or not according to the evidence. *Dismuke v. United States*, 297 U. S. 167, 172 (1936), and cases cited therein. In the instant case, there is no language in the statute denying judicial review and vesting final discretion in the Secretaries of the service departments (A 95).[1] Moreover, there is clear and compelling legislative history to support the petitioners' contention that Congress intended the decisions of the Correction Boards to be subject to review by the courts. *Friedman v. United States*, 141 C. Cls. 239, 258 (1958), and pages 12-13, *infra*.

The court below, in its opinion in petitioner Friedman's case noted that "briefs in pending cases and motions for rehearing or reconsideration strongly suggest that there are large uncertainties and inconsistencies in our past decisions." *Betty Friedman, Executrix, v. United States*, *supra* (A 53). Petitioners can only comment

[1] Such language, though once suggested to the Congress, was intentionally stricken from the bill. 82d Congress, 1st Session, House of Representatives Report No. 449. Pp. 12-13, *infra*.

that, in the decade since pay cases arising in the Departmental Boards for Correction of Military and Naval Records have been reaching the Court of Claims in volume, it has been squarely held by that court in at least nine cases that an allegation of arbitrary, capricious and unlawful action on the part of the Correction Boards gives rise to a fresh cause of action. *Knight v. United States*, C. Cls. No. 64-60 (decided January 18, 1961); *Weiner v. United States*, 148 C. Cls. 445 (1960); *Allin v. United States*, 147 C. Cls. 459 (1959); *Eicks v. United States*, 145 C. Cls. 522 (1959); *Friedman v. United States*, 141 C. Cls. 239 (1958); *Patterson v. United States*, 141 C. Cls. 435 (1958); *Proper v. United States*, 139 C. Cls. 511 (1957); *Suter v. United States*, 139 C. Cls. 466 (1957), cert. den. 355 U. S. 926; *Furlong v. United States*, 138 C. Cls. 843 (1957).

The doctrine has been clearly enunciated in dicta in at least as many more opinions of the court below: *Frederick v. United States*, C. Cls. No. 111-56 (decided July 15, 1960); *Caddington v. United States*, 147 C. Cls. 629 (1959); *San Millan v. United States*, 139 C. Cls. 485 (1957); *Girault v. United States*, 133 C. Cls. 135 (1956); *Odell v. United States*, 134 C. Cls. 634 (1956); *Wales v. United States*, 132 C. Cls. 765 (1955); *Rosnick v. United States*, 132 C. Cls. 1 (1955); *Gordon v. United States*, 129 C. Cls. 270 (1954); *Uhley v. United States*, 128 C. Cls. 608 (1954).

In *Eicks v. United States, supra*, at p. 526, Mr. Justice Reed (Ret.), sitting by designation in holding that the action was not barred by limitations, said, "This suit seeks recovery of salary for periods more than six years prior to its institution but the right to recover is not set up as a salary debt but arises, it is claimed, from the arbitrary and capricious action of the Secretary of the Navy in refusing correction of plaintiff's record." In *Knight v. United States*, C. Cls. No. 64-60, January 18, 1961, Madden, J., speaking for the unanimous court, denied

the government's motion to dismiss the petition as barred by limitations, by reference to the court's earlier decision in a similar case in these terms:

> "In *Furlong v. United States*, 138 Ct. Cl. 843, 845, the court cited seven cases and then said:
>
> The principle of these cases is, first, jurisdiction is conferred by Congress, not on this court, but on retiring boards and the Secretaries of the three armed services, to decide an officer's right to retirement for physical disability, and his consequent right to retired pay; second, it follows therefrom that we cannot acquire jurisdiction of such a claim until after the Board and the Secretary have acted, or failed or refused to act, and not then unless the board and the Secretary acted arbitrarily or capriciously or contrary to law; third, since our jurisdiction could not be invoked until after the retiring board and the Secretary had acted, the statute of limitations on a suit in this court did not begin to run until they had acted; fourth, on a finding of arbitrary or otherwise unlawful action by the retiring board and Secretary, it is our duty to act in the place of the retiring board and, on a finding of disability at the time of discharge, to hold an officer is entitled to retired pay from the date of his discharge.
>
> Since the decision of *Furlong*, the case of *Propes v. United States*, 139 Ct. Cl. 511; *Friedman v. United States*, 141 Ct. Cl. 239; *Patterson v. United States*, 141 Ct. Cl. 435; and *Allin v. United States*, No. 504-55, decided November 4, 1959, have been decided by this court. They all are in accord with what was said in *Furlong, supra*."

Clearly, petitioners submit, the decisions of the court below of which certiorari is sought herein are in conflict with the whole body of law heretofore established, not only by the decisions of this court, but by those of the court below. In these premises, petitioners respectfully submit that this court should resolve the conflict.

2. The decisions for which certiorari is sought, if permitted to stand, will cause severe, unwarranted and unjust harm to the plaintiffs in the Court of Claims who have filed their petitions and, in some instances, assumed the expensive burden of trial in reliance on the series of contrary holdings by that court. As this court said over a century ago, there are no cases where an adherence to the maxim of *stare decisis* is so absolutely essential to the peace of society as those which affect retroactively the jurisdiction of courts. *Maryland v. The Baltimore and Ohio Railroad Co.*, 16 How. 314, 325 (1853). Petitioners submit that to deny hearing of their cases to these litigants below on the grounds of a suddenly raised bar of limitations, which did not exist before and is unjustified now, is equally unconscionable.

At least 25 plaintiffs who are, in respect of limitations, situated similarly to petitioners herein have begun actions in the court below, only to go aground on the new barrier reef erected by the decisions below in these petitioners' cases.[2] Six of them have already borne the costs of trial before Commissioners of the Court. *Walters v. United States*, C. Cls. No. 313-59; *Robinson v. United States*, C. Cls. No. 433-59; *Hellner v. United States*, C. Cls. No. 15-60; *Levadi v. United States*, C. Cls. No. 260-60; *Woodward v. United States*, C. Cls. No. 190-60; *Knight v. United States*, C. Cls. No. 64-60.

Petitioners submit that this is an intolerable injury to be inflicted on litigants whose only lapse has been that they relied on the law as the court below had heretofore clearly and emphatically stated it to be.

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[2] See Appendix D, *infra*. The office of the Clerk of the Court has informally indicated that all of the cases listed in Appendix D are presently suspended until 30 days after final action on the instant petition. Many other such cases, petitioners are advised and believe, are suspended, formally or informally, before various Commissioners of the Court.

3. The issue is one of major public importance. More than 16,000,000 of our citizens served in our last major war, between 1941 and 1946.[4] Prior to 1946, corrections in military and naval records could be made only when authorized by a private bill enacted by Congress.[5] In order to obviate the consideration of a substantial number of such bills subsequent to World War II, Section 207 of the Legislative Reorganization Act of 1946 (60 Stat. 812, 837) provided for the correction of military and naval records by boards of civilian officers or employees of the respective service departments.[6] By 1951, such boards established in the Army, Navy and Air Force had received a total of approximately 15,000 requests for a correction of record.[7] In 1962, there was a total of 2,806,062 men and women on active duty in the armed forces.[8] It may fairly be assumed that the necessity for resort to the correction boards will continue to arise in the same proportion and for the same causes as in the past. Of the 15,000 applications for correction of records filed between 1946 and 1951, the only period for which statistics are available, between 1300 and 1400, or less than 10 per cent, were granted relief.[9] It is not suggested that such statistics have any evidentiary value with respect to the fairness with which the boards dealt with the unsuccessful applicants. It is, however, submitted that a rejection rate of over 90 per cent creates a sufficient space for the intrusion of human error to warrant judicial review in instances wherein arbitrary, capricious or unlawful abuse

[4] World Almanac, 1963, p. 735.

[5] 82d Congress, 1st Session, Senate Report No. 788, p. 1.

[6] *Ibid.*

[7] 82d Congress, 1st Session, House of Representatives Report No. 449, p. 2.

[8] World Almanac, 1963, pp. 725, 726.

[9] Full Committee Hearing on H.R. 1181, House of Representatives, Committee on Armed Services, May 15, 1951 [No. 21], p. 446.

of discretion on the part of the boards is alleged. *Dismuke v. United States, supra.* The legislative history of the 1951 amendment to the Legislative Reorganization Act (10 U. S. C. §1552, A 95) shows clearly, as will be demonstrated hereinafter, that the Congress intended that the right to judicial review should be available to applicants to the boards. In justice to the millions of men and women, past, present and future, who serve the country in military status, the anomalous and highly confused state into which the decisions of the court below have thrown the law ought to be resolved. *Betty Friedman, Executrix, v. United States, supra* (A 53).[9]

4. Petitioners submit that the Congress, in enacting the Administrative Procedure Act, 60 Stat. 237, 243, 5 U. S. C. §1009 (A 94) insured their right to a judicial review of arbitrary, capricious or unlawful action by the Board for the Correction of Military Records. Notwithstanding, although petitioner Friedman pleaded her right to review of her case under the said Act to the court below (*Plaintiff's Reply to Defendant's Suggestion of Bar by the Statute of Limitations*, p. 11) the court either took no cognizance of the issue, or decided it *sub silentio*. The question of the applicability of the Act to decisions of Correction Boards is an important issue in need of the guideposts which a decision of this Court would erect.

5. The issue herein is also of substantial public importance in that the Boards for Correction of Military and Naval Records are the administrative tribunals of last resort for the more than a million men and women on active duty with the armed services, plus the multitude of others in the reserve components who can be similarly affected.[10] A careful search does not disclose a prior instance in which this court has established the

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[9] See pp. 15-21, *infra*.

[10] World Almanac, 1963, p. 734.

guide lines for what shall constitute due process of law with respect to the right of judicial review of the cases of such persons who allege that they have been dealt with arbitrarily, capriciously or unlawfully by the Boards, or the Secretaries of the several service Departments acting through the Boards.

Argument

All military organizations have two responsible internal functions, discipline and administration. Discipline, when necessary, is enforced by the punitive statutes. Most servicemen and women, like the great majority of the population, have little contact or concern with them. But administration, with particular respect to their pay and allowances, is a constant, daily factor in their lives from the moment they don the uniform.

In the conduct of affairs of such magnitude and complexity, there are bound to be errors made and injustices done, no matter how well meaning the administrators. Traditionally, under our governmental system, rectification of such mistakes has been accomplished by acts of Congress for the private relief of the injured persons. At the end of World War II, the burden of such bills on the Congress became substantial.[1] In consequence there was included in the Legislative Reorganization Act of 1946 a provision for the establishment of the Boards for the Correction of Military Records in the several service departments.[2] The statute, in substance, authorized the Secretaries, acting through boards of civilian officers, to correct a military or naval record whenever such action was deemed necessary to correct an error or remove an injustice.[3]

[1] 82d Congress, 1st Session, Senate Report No. 788, p. 1.

[2] Section 207, Act of August 2, 1946, 60 Stat. 812, 837.

[3] *Ibid.*

The effort on Congress' part was well-intentioned but did not prove very fruitful. Shortly after the Boards were established the Comptroller General rendered an opinion[14] to the effect that "neither Section 207 nor other legislation vests in the heads of the specified departments or in this Office any authority to * * * use appropriated funds to pay any claim for money, based on correction made in the military or naval records of an individual under the authority of that section." Congress thereupon proceeded, in 1951, to amend the Act to provide the needed authority.[15] During the hearings on the proposed amendment, it was brought clearly and unmistakably to the attention of the subcommittee of the House of Representatives that certain agencies of the government, the General Accounting Office as well as the service departments, would have preferred that the act, as amended, should specifically preclude review of Correction Board decisions by the courts. The committee's rejection of the suggestion was emphatic. The following is a typical passage:[16]

> "Mr. Doyle: I never like to see the right of the court to review any board abrogated, whatever the board is.
>
> Mr. Baier [representing the Department of Defense]: I think that provision is to prevent a lot of these little cases from going to court and wasting the court's time where the Department has the record and they try to assemble the data.
>
> Mr. Clemente: Unfortunately the word was 'wasting a court's time.' I don't think it is properly put because the courts are there for that specific reason.
>
> Mr. Baier: I will take that back. It will save the court's time, not waste it, sir.

[14] 27 Comp. Gen. 709 (1948).

[15] Act of October 25, 1951, 65 Stat. 655, 10 U.S.C. §1552.

[16] Hearings Before a Subcommittee of the House Committee on Armed Services on H.R. 1181, 82d Cong., 1st Session, pp. 376, 392.

[17] *Ibid.* p. 392.

> Mr. Doyle: I may observe from a quarter of a century of a law practice before the court that fraud is pretty difficult to prove and which you say, except when procured by means of fraud, you are practically eliminating an applicant making a meritorious 'showing' before a Federal court. If there is going to be any wording, I certainly favor the inclusion of 'mistake' on a broader ground, so that at all times the applicants have the right, if they have the money, to go before a court and protect their rights.
>
> And the fact that you have reconsidered cases where there has been supplementary evidence in itself shows that there might well be many cases which might well go before the courts."

In its Report, the full Committee on Armed Services merely stated:[*]

> "On page 3, lines 11 and 12, the committee has deleted the words 'including a review by the courts of the United States' since it is of the opinion that the courts of the United States should not be precluded from reviewing such cases under appropriate circumstances."

It would scarcely seem necessary to belabor this point to such an extent since the court below, in its comprehensive and thoroughly well-reasoned opinion in *Friedman v. United States*, 141 C. Cls. 239, 259 (1958), seemed to have settled the question, if any existed, as to the intent of Congress in these terms:

> "We conclude that Congress had no intention, in enacting the correction board legislation, of withholding from this court jurisdiction to render a money judgment for pay of which a claimant is deprived by reason of the arbitrary or illegal action of a correction board * * *"

Notwithstanding, the court below, in an appendix attached to its opinion in the case of petitioner Friedman,

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[*] 82d Congress, 1st Session, House of Representatives, Report No. 449, p. 3.

now purports to question even its own prior conclusion in this respect. In the premises, petitioners herein can only quote Mr. Justice Reed (Ret.), sitting by designation, as he spoke for the court below in *Eicks v. United States, supra:*

> "It would overturn much of our thinking on justice to say that those words were intended to bar courts from awarding pay to military personnel when they had been deprived of their compensation by failure to correct their service record through arbitrary and capricious action."

Petitioners respectfully submit that the contrary view appears to them more like a somersault than an overturn.[19]

In any event, once the 1951 amendment to the Correction Board statute became law, cases began in due course to arrive before the court below for review. The first appears to have been *Uhley v. United States*, 128 C. Cls. 608 (1954). The plaintiff had been discharged from the Air Force on December 24, 1945, without retirement pay. On May 16, 1952, soon after the effective date of the amendment, but more than six years after his discharge, he applied to the Air Force Board for Correction of Military Records for a correction of his record to reflect his retirement for physical disability. His application was denied on January 2, 1953, and he filed his petition in the court below in February, 1953, alleging that the denial by the Board was arbitrary and capricious. The government moved to dismiss on the ground that the suit was barred by limitations. The court, in overruling the motion, said:

> "Although the alleged error in plaintiff's mititary record was committed, if at all, at the time of plaintiff's separation from the service in 1945, the wrong of which plaintiff here complains and for which he seeks judicial redress, is not the alleged

[19] Or even a judicial flip-flop. See Washington Post, April 17, 1962, p. A-16.

> error *per se*, but the alleged arbitrary and capricious deprivation of the right, conferred by the Act of October 25, 1951, to the action 'necessary to correct an error or remove injustice.' Under these circumstances we are of the opinion that the suit is not barred by the statute of limitation."

On the same day, the court decided *Gordon v. United States*, 129 C. Cls. 270, 277 (1954), by dismissing plaintiff's petition. The court said, however, that the plaintiff had by application thereto invoked the jurisdiction of the Correction Board and *in the absence of arbitrary or capricious action by the Board* he was bound by its terms. The following year, the court wrote in *Rosnick v. United States*, 132 C. Cls. 1, 5 (1955), while dismissing the petition, "that in certain cases in which a manifest injustice has been done the action of the Army Board for Correction of Military Records might serve as a basis for the court to correct such an injustice." The following month, May, 1955, in *Wales v. United States*, 132 C. Cls. 765, 771, the court said:

> "Therefore, in the absence of a clear showing that the Board acted arbitrarily or capriciously and therefore unlawfully, we will not disturb its findings. *Gordon v. United States*, 129 C. Cls. 270. However, the doors of this court are always open to grant relief to a party aggrieved by the action of an executive or administrative officer which is arbitrary or capricious. *Carlin v. United States*, 121 C. Cls. 643. The Supreme Court has long recognized the right of the court to review such action. *Dismuke v. United States*, 297 U. S. 167."

As late as November, 1955, the court below still adhered to the doctrine of *Dismuke v. United States, supra*. In dismissing the petition in *Girault v. United States*, 133 C. Cls. 135, 144, the court said "resort to the court can only be had if the Secretary's action is arbitrary or unlawful. As soon as it appears the Secretary is acting in such a manner, the officer can appeal to the court for redress."

In four cases decided in late 1955 and early 1956, the court, in dismissing the petitions, did so on the ground that resort to the Correction Board was permissive and did not toll the statute of limitations. In none of the four was the question of a new cause of action arising from arbitrary and capricious action by the Board discussed. *Duff v. United States*, 133 C. Cls. 161 (1955); *MacFarlane v. United States*, 134 C. Cls. 755 (1956); *Barker v. United States*, 135 C. Cls. 42 (1956), cert. den. 352 U. S. 935 (1956), reh. den. 352 U. S. 976 (1957); *Soukaras v. United States*, 135 C. Cls. 88 (1956). *Capps v. United States*, 133 C. Cls. 811 (1956), is something of an anomaly since action by the Correction Board was not involved. In principle, however, the court's rationale is in harmony with the present petitioners' contention. In *Capps*, the court held for the plaintiff that his cause of action accrued in 1951 upon the erroneous action of the Discharge Review Board, and not at the time of his discharge from service in 1944 as the government argued. The court cited *Uhley*, *supra*.

Beginning again in late 1956, the court adverted to its *Uhley* position that arbitrary and capricious action by the Correction Board gave rise to a new cause of action. *Furlong v. United States*, 138 C. Cls. 843 (June 1958, overruling the decision of December 5, 1956) stood for the principle enunciated in *Uhley*, that a petition was timely if filed within six years of the time of arbitrary or capricious action by the Secretary or a board. By 1957, the court's doctrine in this field apparently was firmly established. The government contended that the actions in *San Millan v. United States*, 139 C. Cls. 485 (1957); *Suter v. United States*, 139 C. Cls. 466 (1957), cert. den. 355 U. S. 926; *Proper v. United States*, 139 C. Cls. 511 (1957); *Friedman v. United States*, 141 C. Cls. 239 (1958), and *Patterson v. United States*, 141 C. Cls. 435 (1958), all were barred by the statute of limitations.[20] Each plaintiff

[20] See also *Buford S. Kirtley v. United States*, C. Cls. No. 93-55 (defendant's motion to dismiss on the ground of limitations overruled by order July 12, 1957).

had filed a petition in the court alleging arbitrary and capricious action by the Correction Board within six years of such action, but more than six years after his discharge from service not for physical disability. All were suits for disability retirement pay. The court's pronouncements on the matter of limitations were these:

Suter (holding):

> "* * * Our decision is that the plaintiff, when he was released from the Army in 1946, had a total and permanent service-connected disability. If the Physical Evaluation Board in 1951, or the Board for the Correction of Military Records in 1954 had so decided, and the decision had been officially approved, the plaintiff would have received his retired pay from the date of his release in 1946. Since his cause of action is based upon the failure of the first of those tribunals to decide his case at all, or upon the failure of the second to decide the case upon the evidence, we must decide the case as we think they should have decided it, and with like effect."

San Millan (dicta):

> "* * * it has long been held that this court has jurisdiction to render judgment for the pay which was denied the claimant by the arbitrary or capricious actions of the administrative agency of the Government. *Dismuke v. United States*, 297 U. S. 167; *Uhley v. United States*, 137 C. Cls. 275; *Gordon v. United States*, 129 C. Cls. 270; *Suter v. United States*, decided this day, *ante*, p. 466."

Proper (holding):

> "* * * As we said in our recent decision in the case of *John A. Furlong v. United States*, 138 C. Cls. 843, this court acquired jurisdiction of a claim for disability retired pay
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> * * * after the * * * Secretary * * * acted, or failed or refused to act * * * arbitrarily or capriciously or contrary to law; * * *.

"Accordingly, we hold that plaintiff's claim based on the alleged arbitrary action of the Secretary of the Army is not barred by the statute of limitations."

Friedman (holding):

"In a number of recent decisions by this court it has been held that a cause of action for disability retired pay accrues when the Secretary or a Correction Board arbitrarily, capriciously and contrary to law denies such application. *Furlong v. United States*, 138 C. Cls. 843; *San Millan v. United States*, 139 C. Cls. 485; *Proper v. United States*, 139 C. Cls. 511. This event in plaintiff's case took place in 1954. We are of the opinion that whether plaintiff's cause of action accrued in 1952 when the Air Force erroneously failed to retire him according to the findings and recommendation of the Physical Evaluation Board, or in 1954 when the Correction Board denied his application, his claim is not barred by the statute of limitations."

Patterson (holding):

"With respect to the defendant's contention that the plaintiff's claim is barred by the six-year statute of limitations, this court has held that where a plaintiff has received no determination of his eligibility for disability retirement pay by any board until the correction board has acted, his cause of action accrues not at the time of his separation from the service, but at the time of the alleged wrongful action of the correction board, approved by the Secretary, in wrongfully refusing to correct the records and grant the plaintiff disability retirement with pay. *Uhlen v. United States*, 128 C. Cls. 608; *Furlong v. United States*, 138 C. Cls. 843; *Proper v. United States*, 139 C. Cls. 511; *Friedman v. United States*, *supra*; *Suter v. United States*, *supra*. Accordingly, we conclude that the claim stated herein is not barred by the statute of limitations."

Finally, in *Ficks v. United States*, 145 C. Cls. 522 (1959), through Mr. Justice Reed, sitting by designation, the court stated the doctrine fully and, it was thought, once and for all. (Judge Laramore dissented for other reasons.) The court said:

> "The Government pleads this court's six-year statute of limitation as a bar to any recovery for the period between plaintiff's retirement and September 30, 1949. It has not briefed its position. This suit was filed December 2, 1955. The notice of the Board that it had been determined that no change, correction or modification would be made on plaintiff's July 12, 1954, application reached plaintiff October 18, 1955. This suit seeks recovery of salary for periods more than six years prior to its institution, but the right to recover is not set up as a salary debt but arises, it is claimed, from the arbitrary and capricious action of the Secretary of the Navy in refusing correction of plaintiff's record. Under the earliest provision for the correction of military records, 60 Stat. 837, 1207, there was no express limitation as to when the Board proceeding should be begun. In the 1951 amendment, a member of the armed forces had three years after discovery of the error or injustice, or ten years after the enactment of the amendment, 'whichever be later,' to bring proceedings before the Board. 65 Stat. 655. This was the act in effect when plaintiff filed his request for correction before the Board. At present the limiting time is three years after discovery of the injustice or October 26, 1961, 'whichever is later.' The Board, since 65 Stat. 655, may excuse a failure to file in time in the interest of justice. We think this present cause of action arose on the refusal of the Board, after the Secretary's disapproval, to correct plaintiff's record. It was therefore in time.
>
> It is within the jurisdiction of this court to correct the action of the Board if it results from the Secretary's arbitrary disapproval of the Board's decision and recommendation. If the contentions

> of plaintiff are correct, he is entitled to back pay from the United States of over $5,000. This action seeks the recovery of that amount and the right to recover depends on whether the refusal to correct the record was arbitrary. *Friedman v. United States*, n. 4, *supra*, at 255, and cases cited, particularly *Furlong v. United States*, 138 C. Cls. 843. In the *Friedman* case this court pointed out the legislative history that governed our interpretation of the congressional purpose to allow this court to enter judgment for pay withheld by an arbitrary failure to correct a military record, but not to compel 'alteration or correction of an official military record.' Page 258. When Congress said that rulings of Correction Boards should 'be final and conclusive on all officers of the Government except when procured by means of fraud' (65 Stat. 655), it would overturn much of our thinking on justice to say that those words were intended to bar courts from awarding pay to military personnel when they had been deprived of their compensation by failure to correct their service record through arbitrary and capricious action. The correction boards were created to remedy wrongs, not to confound them."

The principle had become so well established that in *Allin v. United States*, 147 C. Cls. 459 (1959), the unanimous court, in giving plaintiff judgment in 1959 for disability retirement pay back to 1946 based on arbitrary and capricious action by a Correction Board in 1954, did not even mention the statute of limitations in its opinion. In *Weiner v. United States*, 148 C. Cls. 445 (1960), Judge Laramore in writing again for the unanimous court,[21] gave judgment in 1960 for disability retired pay back to the date of plaintiff's release from duty in

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[21] Judge Laramore made this comment, however (fn. 3, p. 10 of the slip opinion):

> "The writer of this opinion dissented in the *Suter* case for the reason that plaintiff's claim accrued when he was separated from the Army and hence was barred by the 6-year statute of limitations. Since the majority of the court is of the opinion that the 6-year limitation statute has no applicability in a situation such as presented here, no useful purpose would be served by pursuing this course."

1946, based upon an allegation of arbitrary and capricious action by a Correction Board in 1956, ten years later. In *Frederick v. United States*, C. Cls. No. 111-56, decided July 15, 1960, the Court adhered to the established doctrine, although recovery was limited to pay due for the period of six years prior to the filing of the petition. Judges Whitaker and Laramore dissented. Judge Whitaker, however, stated that "In all of these cases, the question for our determination is whether or not the action of the Secretary is arbitrary or capricious or not supported by substantial evidence."

Finally the court below came to *Knight v. United States*, C. Cls. No. 64-60, which has been discussed to some extent above.[22] In this case, the unanimous court would appear to have stated its position in the clearest, most unequivocal and definitive terms at its command:

> "The Government's motion is based entirely upon the statute of limitations. It raises no other issue. The contention is that the plaintiff's cause of action, if he has one, accrued at the time of his release from active duty in 1947; that that occurred more than six years before he filed his petition in this court, *ergo*, the claim is barred by limitation.
>
> This contention assumes that Congress, in enacting in 1946 and amending in 1951 the statute authorizing the establishment of boards for the correction of military records, intended to create no legal rights but merely to lodge an arbitrary uncontrolled power in the Secretaries to correct records or refuse to correct records as they happened to feel like doing.
>
> The assumption is not sound. That kind of raw power uncontrolled by law could only be conferred by the most express and emphatic language. We have repeatedly held that the Secretaries and their boards for the correction of records must base their decisions upon substantial evidence, and are not privileged to make arbitrary and capricious decisions."

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[22] See p. 7, *supra*.

Notwithstanding, the court below has now abandoned that position for no apparent reason. As demonstrated above, the attempt by the court in petitioner *Friedman's* case to rationalize its shift does not accord with either the facts or the law. In *Lipp, supra*, the court's holding is that resort to the Correction Boards is merely permissive and such resort does not toll the limiting statute, something which was never in issue. The opinion in *Friedman, supra*, is squarely to the contrary, holding, apparently, that resort to *some* board will activate the statute, whether a Correction Board or a Retiring Board.

To perplex the situation beyond repair, the court below, on the same day, allowed recovery in *Harper v. United States*, C. Cls. No. 206-59, decided November 7, 1962, although 15 years had elapsed between the beginning of the period for which he was granted retirement pay and the institution of his suit, the only intervening board having been the Correction Board which had denied his application a year before the filing of his petition.[23]

Petitioners submit that, amidst such confusion, all that can be fairly said is that the real issue upon which this petition turns is simply whether or not the members of the Armed Forces have the right, upon an arbitrary and capricious action by a Correction Board, to the judicial review of such an action that Congress intended to provide, and which is in accord with the doctrine long established by this court and followed, hitherto, by a multitude of cases in the same court to which certiorari is sought.

Petitioners submit that they, in company with the millions of other men and women in uniform, have the right to such review by due process of law. Military forces depend upon morale fully as much as upon equipment and training. Nothing can be more destructive of that morale, and more foreign to our concept of justice, than the derogation of this fundamental right.

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[23] See, also, the apparent holding in *Friedman, supra*, that resort to the Correction Board is *mandatory* in some instances. A 68.

Conclusion

For the foregoing reasons, this petition for certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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